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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARTFORD FIRE INSURANCE CO., *et al.*,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF BROKERS & REINSURANCE MARKETS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rules 21 and 37.2 of the Rules of this Court, Brokers & Reinsurance Markets Association ("BRMA") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioners have consented

to this filing as have all respondents except those who are denominated as "private plaintiffs" in the proceedings below.[1]

BRMA is a trade association of more than 30 domestic reinsurance brokers and professional reinsurers who obtain business through reinsurance brokers.[2] BRMA's members seek leave to file an *amicus* brief to explain to the Court how the business of obtaining and providing reinsurance may be seriously disrupted if the decision of the Court of Appeals is left undisturbed. More specifically, BRMA believes that it is important for the Court to understand at the certiorari stage of this proceeding how the business of broker-placed reinsurance intensifies competition in the insurance industry and enhances consumer welfare — and how the Court of Appeals' decision threatens to undermine both of those functions.

As a trade association that represents the interests of firms whose business is providing and facilitating the placement of reinsurance, BRMA has a meaningful interest in this proceeding and can provide the Court with an important perspective on the adverse competitive effects which the decision below may have.

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[1] The private plaintiffs who have refused to consent to BRMA's filing an *amicus* brief are: Ace Check Cashing, Inc.; Acme Corrugated Box Co., Inc.; Anastasios Markos, T/A Municipal Exxon; Bay Harbor Park Homeowner's Ass'n Inc.; Bensalem Township Authority; Big D Building Supply Corp.; Carlisle Day Care Center, Inc.; Carmella M. "Boots" Liberto, T/A R.J. Liberto, Inc.; Durawood, Inc.; Environmental Aviation Sciences, Inc.; Glabman Paramount Furniture Mfg. Co., Inc.; Henry L. Rosenfeld; Jerry Grant Chemical Associates, Inc.; Keyboard Communications, Inc.; Les-Ray Bobcat, Inc.; and P&J Casting Corp.

[2] A list of BRMA's members is included in the appendix accompanying BRMA's *amicus* brief.

BRMA therefore respectfully requests that the Court grant its motion for leave to file the accompanying brief as *amicus curiae*.

Dated: New York, New York
February 12, 1992

Respectfully submitted,

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BRIEF OF BROKERS & REINSURANCE MARKETS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Brokers & Reinsurance Markets Association ("BRMA") respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. All parties to this proceeding except those Respondents denominated as "private plaintiffs" in the proceedings below have consented to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

BRMA is a trade association of domestic reinsurance brokers and professional reinsurers who obtain business through reinsurance brokers. (A list of BRMA's members is attached as Appendix A.)

BRMA has a significant interest in this litigation because its members play key roles in the process of placing and providing reinsurance. The Court of Appeals' decision on the McCarran-Ferguson Act antitrust exemption threatens to disrupt the process through which BRMA's members obtain and provide such reinsurance to primary insurers in the United States. In addition, the decision below threatens to have serious anti-competitive effects in the insurance and reinsurance industry, including a reduction in the availability of insurance and reinsurance capacity and a concomitant increase in price. BRMA believes that its singular focus on broker-placed reinsurance puts it in a unique position to outline for the Court the anti-competitive impact which the decision below may have.

Reinsurance, which is sometimes defined as "insurance for insurers," is a method used by primary insurers (insurers who issue insurance policies to individuals, businesses or government entities) to spread their risk of loss. In a reinsurance transaction the primary insurer cedes insurance exposure and premium to a reinsurer or group of reinsurers who agree to indemnify the primary insurer for some or all of its losses.

Reinsurance is marketed in two different ways. It can be obtained directly from large, fully-integrated reinsurers who maintain their own marketing staffs ("direct writers"), or it can be obtained from non-integrated reinsurers who receive their business through reinsurance brokers ("broker-accessed reinsurers").[1] Broker-accessed reinsurers are typically smaller than direct writers. Despite their size, broker-accessed reinsurers are able to combine their capacity in particular transactions and underwrite reinsurance risks that might otherwise be assumable only by larger companies, or which might be beyond the capacity of any single company to assume.

Professional reinsurance brokers obtain (or "place") reinsurance on behalf of primary insurers – who are referred to

[1] The distinction between direct writers and broker-accessed reinsurers is not a sharp one. Some broker-accessed reinsurers have some marketing staff and write some direct business. By the same token, some direct writers participate in some brokered business. *See* Baringer, *The Reinsurance Market – The Assuming Reinsurer*, in *Reinsurance* 329, 337 (R. Strain ed., 1980).

interchangeably as "cedants," "ceding companies" or "reinsureds" – by assembling groups of competing reinsurers who agree to assume portions of the cedants' insurance exposure. Each reinsurer in a given group generally agrees to assume a predetermined portion of the insurance risk which the ceding company wishes to cede.

Brokers generally place reinsurance with groups of reinsurers because the size of the exposures involved and principles of risk diversification require dividing the risk among many participants. The use of many reinsurers in a single transaction, however, is hopelessly unwieldy unless all the reinsurers are permitted to reach agreement on the terms of the coverage to be provided. As a result, most broker-placed reinsurance agreements – normally called "treaties" – may be argued to involve a "combination" – the first element of a violation of Section 1 of the Sherman Act. *Cf. United States v. Container Corp. of America*, 393 U.S. 333, 335 (1969). Such combinations should easily survive Rule of Reason examination because they provide tangible, competitive benefits. Nevertheless, McCarran-Ferguson immunity is commercially important to brokers and broker-accessed reinsurers because it protects them from the substantial expense and distraction of antitrust litigation which – ultimately – they should win. Given the fact that virtually every reinsurance treaty can be argued to involve a Section 1 combination, the significance of McCarran-Ferguson immunity cannot be minimized.

The decision below threatens routine reinsurance placements for two reasons. First, under the Court of Appeals' boycott analysis, traditional reinsurance agreements – which necessarily involve coordinated action by competing reinsurers – may be deemed "boycotts" which are not entitled to antitrust immunity. Second, many treaties involve at least one foreign reinsurer and, under the Court of Appeals' ruling, such foreign participation forfeits McCarran-Ferguson protection for all parties to the reinsurance placement.

BRMA does not believe that the Court of Appeals intended to strip broker-placed reinsurance of McCarran-Ferguson protection. To the contrary, the Court of Appeals explicitly ruled that reinsurance was the "business of insurance" for purposes of

the McCarran-Ferguson Act and that reinsurers and brokers were "prima facie immune" under the Act. Despite this language, the Court of Appeals' analysis threatens to destroy the "prima facie immunity" of routine reinsurance placements. BRMA fears that the threatened loss of McCarran-Ferguson immunity will chill the activities necessary to place reinsurance and, potentially, disrupt the process completely. It is this threat to the reinsurance placing and risk distribution process that gives BRMA a strong interest in supporting the Petition.

BRMA has no direct financial interest in the outcome of this litigation. Although some of its members are either defendants or affiliates of defendants in this action, the decision to file this brief was made by an independent majority of BRMA's Board of Directors. Furthermore, this brief is not filed on behalf of any individual BRMA member and may not reflect the views of particular members.

SUMMARY OF ARGUMENT

The decision below threatens to disrupt the process of placing reinsurance through brokers because it strips that process of the antitrust immunity conferred by the McCarran-Ferguson Act. 15 U.S.C. §§ 1011 *et seq.* (1988). The McCarran-Ferguson immunity is lost, first, because the Court of Appeals ruled that a collective "refusal to reinsure" by a group of reinsurers constituted a McCarran-Ferguson boycott which forfeited the immunity. Regrettably, the Court of Appeals' analysis is so imprecise that standard broker-placed reinsurance agreements may be implicated as possible "boycotts" under the Act.

The decision below also deprives routine broker-placed reinsurance of McCarran-Ferguson protection because it arbitrarily strips an otherwise immune reinsurance transaction of the immunity if a *single* foreigner is a party to the transaction. Thus, if a domestic reinsurance placement involving twenty reinsurers has one foreign participant, *all* parties to the agreement lose McCarran-Ferguson protection. Reinsurance transactions routinely cross national boundaries and — especially on large exposures — it is unusual not to have at least some foreign reinsurers. Thus, application of the Court of Appeals' "foreign entity" ruling to

routine reinsurance transactions would deprive a great many reinsurance placements of McCarran-Ferguson immunity.

The Court of Appeals' rulings are particularly disturbing because they threaten to have serious, anti-competitive consequences. Broker-placed reinsurance intensifies competition in the insurance industry because it: enables primary insurers to write additional business; provides financial capacity for alternative risk spreading mechanisms, such as captive insurers, which compete directly with primary insurers; and provides competition for the large direct writers of reinsurance who — without competition from broker-accessed reinsurers — would dominate the reinsurance business. In addition, broker-accessed reinsurance expands the available supply of reinsurance by tapping reinsurance capacity available in London, Europe and Asia. Finally, broker-accessed reinsurers enhance the stability and financial integrity of the insurance industry by efficiently dispersing large amounts of insurance risk among many reinsurers. If the loss of McCarran-Ferguson antitrust immunity occasioned by the Court of Appeals' decision damages or impedes broker-placement of reinsurance, its impact will be unambiguously anti-competitive.

Given the serious risk to competition which the Court of Appeals' decision threatens to have, this Court should grant certiorari.

ARGUMENT

I. Certiorari Should Be Granted Because the Court of Appeals' Overbroad Application of the McCarran-Ferguson Act's Boycott Exception Threatens to Forbid Coordination Among Competing Reinsurers Which is Necessary for the Syndication of Large Scale Reinsurance Capacity Required by United States Insurers.

A. The Assembly of Reinsurance Capacity by Reinsurance Brokers Requires Group Action Which, While Not *per se* Unlawful, May Be Seen to Establish a "Combination," the First Element of a Violation of Section 1 of the Sherman Act.

The Court of Appeals found that the plaintiffs had alleged a boycott within the meaning of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (1988), because:

> [T]he defendant reinsurers and London underwriters used their economic power, *their refusal to reinsure*, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted. They, if plaintiffs are correct in their allegations, engaged in a boycott.

In re Insurance Antitrust Litig., 938 F.2d 919, 930 (9th Cir. 1991) (emphasis added).

The difficulty with the Court of Appeals' analysis is that virtually every large reinsurance placement involves coordinated conduct by competing reinsurers as to the kinds of risks that will – and will not – be reinsured. Indeed, virtually all reinsurance treaties contain a list of "exclusions" which identify specific classes of business which are not covered.[2] Under the Court of Appeals' ruling, an agreement to exclude certain classes of risk is tantamount to a "refusal to reinsure," which, it can be argued, "forces" the ceding company "to accept the terms" on which the reinsurers are willing to reinsure. Thus, according to the Court of Appeals, a traditional reinsurance treaty which specifies the terms of coverage – which the court readily acknowledges is the "business of insurance," 938 F.2d at 927 – may be a "boycott" which strips the parties of McCarran-Ferguson protection.

The threat posed by the decision below is not obviated by the fact that reinsurance placements are essentially vertical transactions between cedants and reinsurers, where all communications to or from a given reinsurer are made through the broker, and where each reinsurer decides independently whether or not to participate in the treaty. Despite these characteristics, there is a distinct danger that, without McCarran-Ferguson protection, traditional reinsurance treaties will be treated as horizontal agreements under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1988). Antitrust analysis long ago passed the point of focusing on structural niceties where the competitors are aware, as is the case in a reinsurance treaty, that they are part of a horizontal arrangement with terms of trade essentially identical for each

[2] *See* 1 K. Gerathewohl, *Reinsurance Principles & Practice*, 677-78 (1980); Salm, *Reinsurance Contract Wording*, in REINSURANCE 79, 81 (R. Strain ed., 1980).

competitor. *See, e.g., United States v. Masonite Corp.*, 316 U.S. 265, 274-75 (1942).

The Court of Appeals acknowledged that McCarran-Ferguson immunity "is incontestable" where the parties "confer and agree on the terms on which insurance would be offered." 938 F.2d at 928-29. Unfortunately, the court's language is directly contradicted by its analysis of the boycott issue and the court's opinion provides no basis on which to reconcile its two conceptions of that immunity. It is a tautology to say than an agreement only to reinsure on certain terms is an agreement not to insure on other terms. Because the court provided no meaningful framework for its analysis, participants in the reinsurance industry – and other courts – are left with no means to determine whether routine reinsurer conduct constitutes a McCarran-Ferguson boycott.

The serious ramifications of the Court of Appeals' decision become clear upon a brief review of the fundamentals of the reinsurance placement process.

1. **The normal operation of the broker-accessed reinsurance business necessarily involves combining the capacity of competing reinsurance firms in a process of syndication.**

Reinsurance involves spreading the risk of loss among a large number of reinsurers. In a manner comparable to the syndication of banks on large loans or securities underwriters on public offerings, reinsurers participate in the "syndication" of insurance risks by individually accepting relatively small portions of a ceding company's exposure on a specific risk or on a large group of risks.[3] *See* Gilmartin, *How Reinsurance Is Marketed*, in REINSURANCE 419, 433 (R. Strain ed., 1980); *Sumitomo Marine & Fire Ins. Co. v. Cologne Reins. Co.*, 75 N.Y.2d 295, 552 N.E.2d 139 (1990). In order

[3] The term "syndication" is not used in this brief as a term of art, nor is it intended to refer to Lloyd's of London "syndicates." Rather, the term "syndication" is used solely as a descriptive term for the combination of reinsurers who participate in reinsurance transactions that disperse insurance exposure among many parties.

to disperse the risk widely, it is necessary to involve a large number of reinsurers in the specific reinsurance transaction.[4]

There are a number of reasons why typical reinsurance placements involve multiple reinsurers. First, each domestic reinsurer has finite financial resources which limit the amount of risk it can assume. *See* Kramer, *The Nature of Reinsurance*, in *REINSURANCE* 1, 28 (R. Strain ed., 1980); *see also* N.Y. Ins. Law § 1115(a) (McKinney 1985).

Second, reinsurers — like primary insurers — have a strong financial incentive to limit their exposure to unanticipated losses. This incentive dictates that reinsurers develop large, diversified "books of business" by taking small participations in a large number of different risks. *See* Gilmartin, *supra*, at 433; Baker, *The Purpose of Reinsurance*, in *REINSURANCE* 33, 34-36 (R. Strain ed., 1980).

Third, ceding companies have an incentive to use a large number of reinsurers because it minimizes their exposure if a reinsurer becomes insolvent or decides to terminate its participation in the reinsurance agreement. The cedant is obviously less vulnerable if the insolvent or cancelling reinsurer provides 5% of the cedant's reinsurance rather than 50%.[5] *See* Gilmartin, *supra*, at 435; Baringer, *supra*, at 339.

The true significance of the need to diversify risks among many reinsurers becomes more apparent when one considers the size of recent large insurance losses. For example, the explosion of the Piper Alpha oil platform in the North Sea in 1988 resulted

[4] It should be noted that some reinsurance placements — usually those involving direct writers rather than broker-accessed reinsurers — involve only one reinsurer. In the usual case, however, a reinsurance contract will involve anywhere from two or three to dozens of individual reinsurers.

[5] In traditional reinsurance agreements, the cedant is liable for the entire loss and then turns to its reinsurers for indemnification. If a reinsurer is insolvent and is unable to pay its share of a loss, the cedant must still pay the claim, even though it cannot collect from the reinsurer. In effect, the cedant retains the "credit risk" of its reinsurer's solvency. 1 K. Gerathewohl, *supra*, at 170; *cf. Excess & Cas. Reins. Ass'n v. Insurance Comm'r*, 656 F.2d 491, 492 (9th Cir. 1981).

in a loss of approximately $1 billion. *See* Shapiro & Aldred, *Brokers Review Coverage for Devastated Oil Platform*, Bus. Ins., July 18, 1988, at 69. The 1989 explosion of Phillips Petroleum's petrochemical complex in Pasadena, Texas, resulted in a loss estimated at $1.3 billion. *See* Bradford, *Blast Rips Phillips Complex*, Bus. Ins., Oct. 30, 1989, at 1. Similarly, the oil spill in Prince William Sound off the coast of Alaska which resulted from the grounding of the Exxon Valdez in 1989 has been estimated to have caused more than $2 billion in damage, and the damage caused by Hurricane Hugo during the same year has been estimated at $4.3 billion. *See* Shapiro, *'89 Disasters Cost $13.8 Billion: Study*, Bus. Ins., April 30, 1990, at 173.

These examples are hardly unique. Similar examples could be presented for the insurance of toxic substances, certain building materials, or medical implants. Each situation presents an example where large amounts of insurance capacity are required because a single risk — or a large number of small risks — presents great exposure which needs to be dispersed among large numbers of reinsurers.

2. **The process of reinsurance syndication requires coordination among participating reinsurers concerning reinsurance terms.**

While the risk syndication process requires large numbers of competing reinsurers, simply massing a group of reinsurers is not enough. The reinsurers must, as a practical matter, agree on the material terms of the reinsurance. *See* Baringer, *supra*, at 344-45. This, in turn, may affect the terms of the insurance policy which the cedant plans to issue to its policyholder(s). *See* Koehnen, *Administration & Maintenance of Business in Force*, in *REINSURANCE* 491, 506-07 (R. Strain ed., 1980).

There are several reasons why each reinsurer needs to agree individually to the same terms of coverage as the other participants to the treaty. First, the ceding company needs to be certain that the terms of the reinsurance are completely concurrent with its present and prospective primary policies — *i.e.*, that the reinsurance covers the entire primary policy or at least all portions of the policy that the cedant wishes to reinsure.

In order to obtain concurrency, each of the reinsurers must provide the same terms of coverage. If the participating reinsurers fail to provide the same coverage terms, the cedant faces the unacceptable risk that there may be holes in its reinsurance protection.

Second, the transaction costs of dealing with a large number of reinsurers are significant. *See* Baringer, *supra*, at 339-40. While it is a substantial task to negotiate terms and allocate premium, losses and salvage recoveries among five or ten or twenty reinsurers where there *is* agreement on the terms of coverage, it would be prohibitively costly and cumbersome to negotiate and carry out separate agreements with each reinsurer where agreement cannot be obtained. Indeed, it is easy to imagine the logistical nightmare of a cedant trying to cede premium and obtain reimbursement for losses from twenty different reinsurers where each has a different reinsurance contract with different terms. In such a case, the transaction costs quickly become so prohibitive as to preclude the placement of the treaty.

In short, in order for reinsurance syndications to work, a number of competing reinsurers must be assembled and each one must agree to provide coverage on the same terms as the other participants. Anything less will seriously impair — or completely defeat — the operation of the reinsurance process.

B. Broker-Placed Reinsurance Increases Competition and Enhances Consumer Welfare by Increasing the Supply of Primary Insurance, Dispersing Insurance Risks Written by Primary Insurers and Permitting Primary Insurers to Diversify Their Risk Portfolios.

Typical multi-reinsurer treaties — even if analyzed as "combinations" among competitors for Sherman Act purposes, *cf. United States v. Container Corp. of America*, 393 U.S. at 335 — are, unquestionably, pro-competitive. First, and perhaps most importantly from the standpoint of consumer welfare, broker-placed reinsurance permits the dispersal of insurance risk among large numbers of reinsurers, thereby protecting the solvency

and stability of primary insurers. *See* Complaint of Respondent State of California ("Cal. Cmplt.") ¶ 29.

Second, and perhaps more significantly from an antitrust perspective, reinsurance supplies the means for intensified competition among primary insurers by providing them with additional insurance capacity. This capacity, in turn, permits primary insurers to write a greater premium volume, or to insure a wider diversity of risks or to offer higher insurance limits to policyholders, depending on the nature of the reinsurance. *See* Kramer, *supra*, at 28, 30; *see also* R. Carter, *REINSURANCE* 8-9, 65 (2d ed. 1983). These features of reinsurance are particularly important to small insurers with limited surplus because it permits them to compete with larger, better capitalized insurers. *See* Kramer, *supra*, at 30; Baker, *supra*, at 34; *accord* Cal. Cmplt. ¶ 29. As explained in one leading reinsurance text:

> Reinsurance also provides an insurer with additional underwriting capacity in that he can both accept larger risks than otherwise would be possible and sometimes accommodate existing policyholders by writing types of business which normally he would prefer to avoid. Domestic insurance markets in most western countries are highly competitive, and the extra capacity and flexibility which reinsurance facilities provide can particularly assist smaller insurance companies in competing for business.

R. Carter, *supra*, at 8.

Third, broker-placed reinsurance further intensifies competition among primary insurers by providing additional insurance capacity for the creation of risk-spreading mechanisms which offer alternatives to the protection provided by traditional insurers. For example, large corporations or members of trade groups often find it desirable to bypass traditional primary insurers and form their own "captive" insurer. *See* R. Carter, *supra*, at 32-34; Baker, *supra*, at 34. The owners of the captive — who effectively are acting as their own insurers — frequently turn to reinsurance brokers to assemble the reinsurance capacity they require in order to make the captive operational.

The pro-competitive benefits of reinsurance are theoretically available from a single large reinsurer in an unsyndicated transaction. However, the marketplace also offers these benefits through brokered transactions involving multiple reinsurers. The inclusion of multiple reinsurers on a single agreement is a typical pattern, dictated by the considerations of risk dispersal and accumulation of capacity as noted above. And the action of brokers and reinsurers in putting together such treaties in itself intensifies competition in the reinsurance industry by providing competition to the large, direct writer reinsurers.

In short, broker-placed, syndicated reinsurance increases the supply of insurance available to consumers and provides all of the traditional economic benefits associated with an increase in supply. Such reinsurance also carries with it the added benefit of enhancing the financial security of the primary insurers who deal directly with consumers. The provision of this reinsurance is, unambiguously, pro-competitive and welfare enhancing.

C. The Court of Appeals' Boycott Analysis Threatens to Undermine the Competition and Consumer Welfare Functions Served by Broker-Placed Reinsurance.

Broker-placed reinsurance treaties, even if analyzed as "combinations," are not Sherman Act violations which require McCarran-Ferguson protection to establish their legality. To the contrary, because of their distinct pro-competitive effect, such transactions should pass a Rule of Reason examination rather easily. *Cf. Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23 (1979) ("joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price fixing schemes, where the agreement on price is necessary to market the product at all"); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

Despite the pro-competitive impact of reinsurance placements, reinsurance brokers and reinsurers require McCarran-Ferguson protection for commercial reasons. Such protection is necessary because, without the antitrust exemption, every reinsurance placement involving more than one reinsurer becomes a potential antitrust case. Without the exemption, parties to reinsurance

placements become potential antitrust targets every time: reinsurance premium rates increase; reinsurance availability falls due to changing economic conditions; or a party to the negotiations is dissatisfied with the result. This will add a significant additional element of risk to the reinsurance placement process because reinsurers will be asked not only to assume traditional underwriting risk, but also to assume the risk of antitrust litigation arising from the placement of the reinsurance itself.

In essence, the Court of Appeals' decision threatens to have a "chilling effect" on reinsurance syndications by making it dangerous for reinsurers to participate in large multi-reinsurer placements or to negotiate over terms of coverage. The expected result will be that large or difficult placements, which can only be made with extensive negotiation, will not be made at all. The effects will be a reduction in reinsurance availability, a loss of competition at the primary insurance level and an increase in consumer prices — the very antithesis of antitrust enforcement.

D. Neither the McCarran-Ferguson Act nor Authoritative Precedent Supports a Ruling that a Bona Fide Agreement Among Reinsurers Concerning Terms and Coverage of Specific Reinsurance Transactions Constitutes a McCarran-Ferguson Boycott.

As the Petition for Certiorari makes clear, neither Section 3(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1013(b) (1988), nor this Court's decision in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978), supports the decision below. *See* Petition for a Writ of Certiorari, at 18-25. Moreover, nothing in *Barry* or the Act suggests that a boycott can be found in the actions of parties to a reinsurance contract who establish concurrent terms of coverage for that contract. Indeed, in *Barry* — where the Court found a boycott to exist — the majority explained its ruling by noting that "[t]his concerted refusal to deal went well beyond a private agreement to fix rates and terms of coverage." 438 U.S. at 553. Given the fact that, under the Court of Appeals' analysis, a "private agreement to fix rates and terms of coverage" may be seen to constitute a boycott, certiorari should be granted.

II. Certiorari Should Be Granted Because the Decision Below Strips a Reinsurance Transaction of McCarran-Ferguson Immunity Whenever a Single Party to the Transaction is Foreign.

A. Under the Court of Appeals' Ruling, the Participation of Foreign Reinsurers in a Reinsurance Contract — a Routine Event in the Assembly of Reinsurance Capacity by a Reinsurance Broker — Destroys the Exemption Which Congress Wisely Intended to Afford Syndicated Placements of Reinsurance.

The Court of Appeals ruled that the defendants were not entitled to McCarran-Ferguson antitrust immunity because the participation of foreign entities in the alleged conspiracy stripped all participants of McCarran-Ferguson protection. The Court of Appeals reached this conclusion despite the fact that it found: a) the defendants were engaged in the "business of insurance;" and b) the American insurers, reinsurers and brokers were all "prima facie immune" under the McCarran-Ferguson Act. *In re Insurance Antitrust Litig.*, 938 F.2d at 927-28. Despite these findings, the court ruled that all of the domestic parties had forfeited their immunity because "[m]embership of an exempt entity [the domestic defendants] in a conspiracy with nonexempt entities [the foreign defendants] makes the exempt entity liable." *Id.* at 928.

As with its boycott analysis, the Court of Appeals' "foreign entity" ruling effectively strips routine reinsurance transactions of McCarran-Ferguson protection. According to the decision below, a reinsurance placement in which only domestic insurers, reinsurers and brokers are involved is "prima facie immune" under the McCarran-Ferguson Act. However, if a single foreign reinsurer becomes a party to the transaction, the entire placement and *all* the domestic participants lose their immunity because the participation of a single "nonexempt entit[y] makes the exempt entit[ies] liable." *Id.* Under the Court of Appeals' approach, the citizenship of the parties — rather than the

substance of the transaction — is the dispositive element in the application of the McCarran-Ferguson Act.

The Court of Appeals' ruling threatens to have pernicious side effects by diminishing the ability of domestic brokers to assemble reinsurance capacity for domestic primary insurers. This is so because foreign reinsurers provide essential capacity to the United States insurance industry.[8] This is not a matter of dispute. In its own complaint, the State of California avers that:

> Approximately half of Lloyd's [of London's] casualty business involves North American risks.
>
> The principal markets for the supply of reinsurance of North American CGL risks are in the United States, London, and the European continent.

Cal. Cmplt. ¶¶ 4.t & 30.

Given the undisputed fact that the insurance industry is international in scope and that the United States relies heavily on foreign reinsurance capacity, it is hardly surprising that domestic reinsurance brokers routinely turn to foreign reinsurers to complete the placement of business which domestic reinsurers cannot complete themselves. The Court of Appeals' decision that McCarran-Ferguson immunity is lost where foreigners are involved in the transaction effectively and arbitrarily repeals the McCarran-Ferguson Act for a significant percentage of routine reinsurance placements. Such a far-reaching and questionable decision warrants the review of this Court.

B. The Decision Below Threatens to Disrupt the Supply of Reinsurance and Insurance to United States Consumers.

Reinsurance treaties involving foreign reinsurers, no less than treaties limited to domestic reinsurers, require concurrency of

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[8] *See* Baringer, *supra*, at 332-33. *See also* Levin, *U.S. Re Premiums Fall 3.4 Percent in 1988*, Nat'l Underwriter (Prop./Cas.), June 19, 1989 (Supp.), at 4 & Ex. D; Zech, *Re Ratio 105.7 in '87*, Nat'l Underwriter (Prop./Cas.), Aug. 29, 1988 (Supp.), at 7 & Ex. D; 1 B. Webb & H. Anderson, *PRINCIPLES OF REINSURANCE* 20 (1990).

terms and, accordingly, agreement to those terms by the domestic and foreign treaty participants. If participants in such treaties are deprived of McCarran-Ferguson immunity, they face the same antitrust concerns that were described in Point I, *supra*. By stripping treaties of McCarran-Ferguson immunity solely because foreign reinsurers participate, the decision below discourages domestic insurers, reinsurers and brokers from soliciting foreign participation in domestic reinsurance placements. In effect, the decision below imposes an antitrust penalty on domestic brokers, insurers and reinsurers who participate in treaties with foreign reinsurers.

As discussed at length in Point I (B), *supra*, the welfare of United States consumers of primary insurance is enhanced by the availability of reinsurance to primary insurers. *See also* Cal. Cmplt. ¶ 34. Given the significance of foreign reinsurance capacity to the domestic insurance industry and the inability of domestic reinsurers to meet the nation's entire reinsurance needs themselves, the inevitable result of the Court of Appeals' ruling will be a loss of available reinsurance capacity, a consequent reduction in the supply of primary insurance capacity and an increase in the cost of insurance to consumers. In light of these unfortunate anti-competitive consequences, this Court should grant certiorari to consider this aspect of the McCarran-Ferguson issue.

C. The Court of Appeals Misapplied the McCarran-Ferguson Exemption by Basing its Analysis on the Citizenship of the Parties Rather than the Nature of the Activity in Question.

The test for McCarran-Ferguson immunity is whether the conduct at issue is part of the "business of insurance" and is regulated by state law. The Court of Appeals flatly held that the "business of insurance" requirement was satisfied and that the requirement of state law regulation was met by the domestic defendants. *In re Insurance Antitrust Litig.*, 938 F.2d at 927-28. Nevertheless, the court ruled, based solely on the citizenship of the parties, that *none* of the defendants — even those domestic insurers and reinsurers who it found to be "prima facie immune,"

id. — could claim the protection of the statute because *some* of the defendants were foreign. The Court of Appeals' analysis is contrary to the text of the statute and the decisions of this Court.

We start with the language of the statute. Sections 1 and 2 of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12 (1988), address and focus on the "business of insurance" and "regulation" of that business "by the several states." Neither of these sections, nor Section 3(b), 15 U.S.C. § 1013(b) (1988), which contains the boycott exception, focuses on or even mentions the citizenship of the parties. There is thus absolutely no support in the statute's language for the talismanic importance which the Court of Appeals now ascribes to the citizenship of the parties.

The Court of Appeals based its foreign entity ruling on a comment made at the end of this Court's decision in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979), that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." In a case like *Royal Drug*, where the issue for decision was whether certain conduct constituted the "business of insurance," it is hardly surprising that the status of the participants — whether they were or were not in the insurance industry — was an important factor in the Court's analysis. However, the Court of Appeals' application of *Royal Drug* was wrong for three different reasons.

First, even where an issue is presented as to whether the activity in question constitutes the "business of insurance," the involvement of an entity outside the insurance industry is not dispositive. This Court made that clear after *Royal Drug* in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) — a decision which the Court of Appeals did not cite. There, this Court was explicit in its view that whether parties to an agreement were "entities within the insurance industry" was only one of three criteria — "[n]one of [which] is necessarily determinative in itself" — applicable to determining whether the agreement, rather than the parties, constituted the "business of insurance." *Id.* at 129. Indeed, in *Pireno*, the Court allowed that McCarran-Ferguson could apply where the participants were not even members of the insurance industry. *Id.*

Second, in this case, in contrast to *Royal Drug*, the Court of Appeals itself held that the activity in question is the business of insurance and involves *only* participants in the insurance industry. Under such circumstances, the predicate for the analysis of "exempt" and "non-exempt" parties is simply not present and the Court of Appeals' use of that analysis is misplaced.

Third, as a matter of simple logic, whether activity is the "business of insurance" can hardly be negated merely because the analyzed party is an insurance company. The business of insurance is obviously less likely to be implicated where a transaction involves not only insurance companies but also pharmacies (as in *Royal Drug*). If the "business of insurance" issue were in doubt in this case, and if Lloyd's were still a coffee house, a similar inference might be drawn. But to rule that the antitrust exemption for the "business of insurance" is negated by the presence of Lloyd's of London, the world's largest insurance exchange, is manifestly wrong.

CONCLUSION

For the reasons stated herein, BRMA, as *amicus curiae*, respectfully requests that a writ of certiorari be issued.

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Respectfully submitted,

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APPENDIX A

Members of the Brokers & Reinsurance Markets Association

Alexander Reinsurance Intermediaries, Inc.
Allstate Insurance Company
Aon Reinsurance Agency
AXA Reinsurance Company
Christiania General Insurance Corporation of New York
CIGNA Reinsurance Company
CNA Insurance
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G.L. Hodson & Son, Inc.
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Guy Carpenter & Co., Inc.
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Intere Intermediaries, Inc.
Kemper Reinsurance Company
Liberty National Fire Insurance Co.
NAC Re Corporation
PMA Reinsurance Corporation
Re Capital Corporation
Reliance Reinsurance Corp.
SCOR Reinsurance Company
Skandia America Group
St. Paul Reinsurance Management Corp.
Sullivan Payne Company
The Hartford Insurance Group
The Mercantile and General Reinsurance Co. of America
The Reinsurance Corporation of New York
Tokio Re Corporation
Towers Perrin Reinsurance
Trenwick America Reinsurance Corporation
Underwriters Reinsurance Co.
U.S. Re Corporation
Willcox, Incorporated
Winterthur Reinsurance Corporation of America